

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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| In re Applications of |) | MM Docket No. 92-61 |
| |) | |
| LRB Broadcasting |) | File No. BPH-901218MI |
| |) | |
| David Wolfe |) | File No. BPH-901219MI |
| |) | |
| Zenitram Communications, Inc. |) | File No. BPH-901220MG |
| |) | |
| For Construction Permit |) | |
| For a New FM Station on |) | |
| Channel 288A, Brockport, New York |) | |

To: The Commission

APPLICATION FOR REVIEW

Zenitram Communications, Inc. ("Zenitram"), by its counsel and pursuant to Section 1.115 of the Commission's rules, hereby seeks review by the full Commission of the decision of the Review Board ("Decision"), FCC 92R-78, released October 7, 1992, in the above-captioned proceeding. As set forth below, decisionally significant aspects of the Decision are: (a) not supported by substantial evidence in the record as a whole; (b) substantively incorrect and in conflict with established precedent and/or (c) sufficiently novel and important to warrant Commission review.

QUESTIONS PRESENTED

Whether the Administrative Law Judge ("ALJ") and Review Board erred in rejecting Zenitram's good cause showing and thus failing to accept its Notice of Appearance ("NOA")?

Whether the Review Board erred in considering basic qualifications issues which had not

been designated and were not at issue?

Whether the Review Board and ALJ erred by failing to address whether Zenitram paid its hearing fee?

Whether the Review Board failed to apply Commission precedent regarding attorney nonfeasance?

STATEMENT OF THE CASE

This proceeding involves the mutually-exclusive applications of Zenitram, David Wolfe ("Wolfe") and LRB Broadcasting ("LRB") for a new FM station at Brockport, New York. By Memorandum Opinion and Order ("MO&O"), FCC 92M-688, released June 12, 1992, the application of Zenitram was dismissed for failure to prosecute. The circumstances of this case do not rise to the level which, as defined by applicable Commission precedent, support dismissal. Accordingly, Zenitram appealed the Order of the ALJ to the Review Board. In its Decision, the Review Board upheld the Order of the ALJ. However, the Review Board failed to properly evaluate whether the ALJ erroneously determined that Zenitram's hearing fee had not been paid. It also relied heavily upon supposed prejudice to the other parties' ability to investigate Zenitram's basic qualifications, even though there were no pending issues regarding those matters. The Decision held Zenitram to strict adherence with the deadline for filing its Notice of Appearance and rejected Zenitram's argument that good cause supported its late filing. Moreover, the Review Board unjustly gave short shrift to Zenitram's appeal for leniency in the filing deadlines due to the nonfeasance of its attorney.

ARGUMENT

I. The Facts of This Case Do Not Warrant Dismissal.

The Order dismissing the Zenitram application cites two reasons supporting the presiding Administrative Law Judge's ("ALJ") decision. First, Zenitram's Notice of Appearance ("NOA"), Standard Integration Statement ("SIS") and Standard Document Production ("SDP") were untimely filed; and second, it could not be established that Zenitram had paid its hearing fee.

Zenitram's NOA, due to be filed on May 4, 1992, was apparently dated and dispatched to the courier for delivery at the FCC before 5:30 on that date. As evidenced by the Report filed by Zenitram's previous counsel, a copy of which is appended to Zenitram's Appeal as Attachment 1, the package containing the NOA was not only not delivered by 5:30, but was also inexplicably held by the courier at Washington's National Airport for two weeks. Counsel did not become aware that the NOA had not been filed until May 18th, at which point it was promptly filed.

Zenitram's integration statement, due to be filed by May 11, 1992, was filed one day late, despite being prepared, dated and transmitted for filing on May 11, 1992. The presiding ALJ has separately stricken the Integration Statement on timeliness grounds. (MO&O, FCC 92M-654, released June 10, 1992, hereinafter "June 10th MO&O"). Document production, due on May 11, 1992, was provided by Zenitram's previous counsel on June 2, 1992, untimely by only two weeks. In the June 10th MO&O, the ALJ further opined

that if Zenitram were not dismissed, it would be foreclosed from making any comparative showings. June 10th MO&O at footnote 1.

The rejection of the integration statement and denial of comparative credit by the ALJ had the effect of eliminating all possible prejudice to the other applicants. The need to engage in any comparative discovery was gone, and therefore the slight delay in the filing of Zenitram's NOA had no disruptive effect whatsoever on the other applicants. It should be noted that Zenitram's basic qualifications were not then, and are not now, in issue. The other parties had no right whatsoever to inquire into basic qualifications matters, and they were therefore not "prejudiced" by a delay in receiving discovery materials which were significant only to Zenitram's basic qualifications. Thus, it is wholly inappropriate for the Review Board to question the basic qualifications of Zenitram. Even more egregious is the unsupported manner in which the Review Board indicted Zenitram's basic qualifications.

In its appeal to the Review Board, Zenitram also stated that dismissal by the presiding ALJ was based, at least in part, upon the ALJ's belief that Zenitram had not filed its hearing fee. It remains unclear why Zenitram's payment in 1991 of the pre-designation hearing fee was an issue before the ALJ. That question (if there was one) should have been fully and finally resolved by the Bureau's inclusion of Zenitram's application among those designated for hearing. Moreover, as evidenced by the FCC date stamp, Zenitram's hearing fee was, in fact, timely filed on July

15, 1991 and negotiated by the FCC. See Exhibit 1, attached to Zenitram's Appeal to the Review Board, containing the date-stamped letter and cancelled check. Despite the Bureau's clear resolution of this matter, the MO&O states that a review of the Commission's list of hearing fee payments "failed to reflect a payment of a hearing fee by Zenitram between July 8, 1991 and July 16, 1991." MO&O at 3. The ALJ's dismissal was clearly based, at least in part, upon a false premise.

Moreover, in the Review Board's Decision, the issue of the hearing payment was discarded without consideration. The Review Board stated that the hearing fee was a non-decisional matter, because, even if payment of the fee were properly documented, the late filing of the NOA nevertheless resulted in dismissal. In the MO&O, the ALJ clearly indicated that dismissal was partially based upon the non-payment of the hearing fee. Had the ALJ and the Review Board properly considered the hearing fee payment, then the good cause showing which was evaluated by both may have weighed more favorably for Zenitram. As demonstrated below, even the proper evaluation of the nonfeasance of Zenitram's prior counsel would take into consideration the history timely responses to Commission deadlines. Still, even to this point of review, Zenitram is falsely dogged by the stigma of non-payment. The Review Board simply sidestepped an issue of decisional significance.

II. Commission Precedent Supports the Reinstatement of the Zenitram Application.

Although the ALJ and the Review Board identified the appropriate legal standard as set forth in Communi-Centre Broadcasting, Inc., they failed to apply precedent which would have supported good cause for the acceptance of the NOA. In Communi-Centre Broadcasting, Inc. v. FCC, 856 F.2d 1551, 1554 (D.C. Cir. 1988), the Court opined that, in evaluating just cause to dismiss an applicant for failure to prosecute, the Commission must consider (1) the justification for failure to comply, (2) the prejudice suffered by other parties, (3) the burden placed on the administrative system, and (4) the need to punish abuse of the system and deter further misconduct.

First, the justification for the late filing of the NOA is unchallenged. While Zenitram's previous counsel obviously cut the filing close, the latest that anyone could reasonably have expected the NOA to be delivered was May 12th, a one day delay which would not realistically have had any effect whatsoever on the conduct of the proceeding. Indeed, since it is undisputed that Zenitram had earlier filed an NOA on July 15, 1991, it can be reasonably argued that Zenitram filed not too late but too early. At most, the failure to file again with another member of the agency was a relatively minor technicality. Second, as we have seen, not only was an NOA filed earlier than May 4th, but even the slight delay in the filing of the second NOA had no prejudicial effect. The only such effects articulated by the ALJ stemmed from the possible delay in discovery. MO&O at 6. However, since Zenitram's integration statement had already been stricken, and no comparative

issue was designated against Zenitram, no further discovery against Zenitram was necessary or appropriate. Third, the chief "burden" placed on the administrative system has been the burden of reviewing a motion to dismiss Zenitram's application and writing the dismissal order. Zenitram can hardly be charged with having imposed on other applicant the burden of seeking the dismissal of its application, or with putting the ALJ to the trouble of dismissing it. Finally, the consequences of late-filing are so potentially severe that no one in his right mind would deliberately file late as a tactic to "delay the implementing of the early discovery procedures." Id. The ALJ's suggestion to that effect is not reasonable.

Traditionally, the Review Board has carefully evaluated the individual circumstances surrounding requests for reinstatement by applicants dismissed for failure to prosecute. In this regard, the Board has tempered the harshness of absolute compliance with procedural rules by considering "unusual" or "very special circumstances" which may explain or excuse failures of an applicant for procedural rules "are not to be wielded with Draconian, mechanical, or insensitive finality." Horizon Community Broadcasters, Ltd., 102 FCC 2d 1267 (Rev. Bd. 1982), citing Pan American Broadcasting Co., 89 FCC 2d 167, 170 (Rev. Bd. 1982). Even recent case law demonstrates that outright dismissal for the untimely filing of an NOA is unduly harsh. In Cannon Communications Corp., an applicant's failure to timely amend its application and failure to comply with an ALJ's order did "not

amount to the kind of egregious, disruptive or prejudicial conduct for which the sanction of dismissal is appropriate." 6 FCC Rcd. 570, 570 (Comm'n 1991). Most recently, the conduct of Nancy Naleszkiewicz which led to the late filing of her NOA was deemed not so "derelict in complying with procedural requirements as to deserve dismissal for non-prosecution." Nancy Naleszkiewicz, 7 FCC Rcd. 1797, 1799 (Comm'n 1992). In Nancy Naleszkiewicz, the full Commission applied these standards to exonerate the grossly late (45 days) filing of a notice of appearance. The Commission noted that stricter standards might apply in a comparative context, but it nevertheless pardoned the late filing under circumstances far more egregious than those presented here. The Review Board rejected the precedent established by Nancy Naleszkiewicz in particular, stating that the case was distinguishable because it involved only one applicant (presumably, the existence of only one applicant eliminates the possibility of prejudicing other applicants). As has been established, however, since Zenitram has not sought nunc pro tunc acceptance of its integration statement, there is no comparative prejudice to the other parties. Zenitram therefore falls precisely into the Naleszkiewicz precedent.

In addition, in cavalier fashion, the Review Board ignored Commission precedent which excuses an untimely filing attributable to attorney malfeasance. Numerous cases exist which involve the dilatory conduct of applicant's attorneys. Cases in which a pattern of dilatory conduct existed, and in which the applicant failed to exercise due diligence in the wake of such conduct have

routinely led to dismissal. See, e.g., V.O.B. Inc., 4 FCC Rcd. 6753 (Rev. Bd. 1989); Warren Price Communications, Inc., 4 FCC Rcd. 1992 (Comm'n 1992); Carroll, Carroll & Rowland, 4 FCC Rcd. 7149 (Rev. Bd. 1989); Mark A. Perry, 4 FCC Rcd. 6500 (Rev. Bd. 1989). In sharp contrast, the nonfeasance of an attorney which was not part of a pattern of dilatory conduct, but an isolated instance, and the attendant diligence of the applicant to rectify the situation, justifies the reinstatement of an applicant. See Maricopa County Community College District ("Maricopa"), 4 FCC Rcd. 7754 (Rev. Bd. 1989). Precedent clearly establishes that reasonable reliance upon one's attorney, and diligent action in the wake of attorney nonfeasance may excuse an applicant's violation of procedural rules.

Prior to the delayed filings within a two week in May of 1992, Zenitram's application had been diligently and timely prosecuted in all respects. No prior pattern of attorney inattention had placed Zenitram on notice that its application could be in jeopardy. Thus, Zenitram reasonably relied upon its attorney. Moreover, immediately upon receipt of the Order dismissing its application, Zenitram moved to secure new counsel and acted to have its application reinstated. Given that Zenitram could not have foreseen a series of bizarre coincidences, or the sudden incapability of its attorney to effectively prosecute its application (whichever the case may be) the outright dismissal of the Zenitram application is inordinately harsh.

III. Conclusion.

When the foregoing factors are given proper consideration, it is clear that both the presiding ALJ and the Review Board committed error in this proceeding. The ALJ and the Review Board failed to make an affirmative determination with respect the payment of Zenitram's hearing fee. The Review Board inappropriately called the basic qualifications of Zenitram into issue, when in fact, no such designation was in issue. The ALJ and the Review Board identified the proper standard for evaluating the late-filed NOA, yet callously failed to apply Commission precedent supporting the acceptance the NOA for good cause. The dismissal of Zenitram's application by the ALJ and the Review Board is inordinately harsh. The slightly late-filed NOA had (a) already been filed with the agency, (b) occurred under totally unpredictable circumstances, and (c) meets none of the criteria established by for outright dismissal of an application. The ALJ's characterization of Zenitram's "tactics" suggests a designed plan to garner an unfair advantage, a characterization which is simply not supported by the record. Equitable considerations call for the reinstatement of Zenitram. Accordingly, Zenitram respectfully requests that its application be reinstated.

Respectfully Submitted,

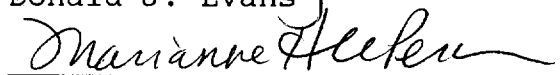
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November 6, 1992

By:


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CERTIFICATE OF SERVICE

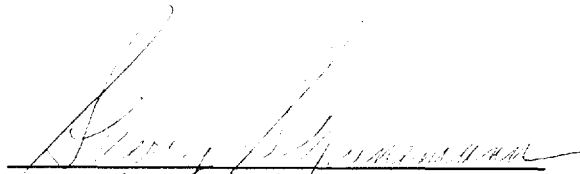
I, Sherry Schunemann, a secretary in the law firm of McFadden, Evans & Sill, do hereby certify that a copy of the foregoing "Application for Review" was mailed by First Class U.S. Mail, postage prepaid, this 6th day of November, 1992 to the following:

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